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dents of these problems, ought to give our attention very seriously to the question of how to get the court of justice, approved in principle at the Second Hague Conference, into actual operation. It will take us some time to get it into operation, of course. In the eleven years since it was established the present court of arbitration has only had some nine cases before it, and I doubt if in the next ten or twelve years it will have as many more. When your court of justice is created it will take a long time to get it thoroughly into operation. Let us therefore devote our energies to securing the appointment of the judges and getting the court started.

The CHAIRMAN. I take great pleasure in yielding the chair to one of our most distinguished vice-presidents, Judge George Gray, presiding judge of the United States Circuit Court of Appeals for the Third Circuit, and I do so all the more readily, if your honor will permit me to say a few words upon the pending paper.

[Judge Gray took the chair, and Mr. Wheeler was recognized.]

Mr. EVERETT P. WHEELER. My object in preparing some observations for presentation to this meeting is to point out how I think it might be easier to bring cases before the Hague Tribunal.

ADDRESS OF EVERETT P. WHEELER, OF NEW YORK,
on
A PERMANENT COURT OF INTERNATIONAL JUSTICE.

In dealing with this subject, it is important to bear in mind that the mere enactment of any legal proposition, however wise, is of itself insufficient. As Professor Pound of Harvard has recently pointed out, one of the most important points in the study of the problem of jurisprudence is to consider "the means of making legal rules effective. This has been neglected almost entirely in the past. We have studied the making of law sedulously. It seems to have been assumed that when made, law will enforce itself."

When the first Hague convention was adopted, there were many diplomats who doubted and were of the opinion that it was no more than a pious wish which would never be made effective. We owe it to President Roosevelt that when the controversy arose between Mexico

and the United States with reference to the disposition of the so-called "Pious Fund," the controversy was referred to the Hague tribunal. Since that time the court has held numerous sessions and has disposed of some important controversies. But little attention has been paid to the important task of making the access to that tribunal more easy. The old diplomatic methods have largely been retained. These took no account of an international tribunal capable of deciding controversies between citizens of different countries. There is perhaps nothing more conservative than diplomacy.

I wish to speak today of that great body of controversies which consist of claims against a sovereign state by citizens of another sovereign state. The courts of England and America on the whole have been disposed to hold that such controversies can only be dealt with through diplomatic channels. Perhaps no case has gone so far as that of *The American Banana Co. v. The United Fruit Co.*, reported in 213 U. S., 347. This was an action brought by one citizen of the United States against another. It was alleged that this defendant, an American citizen, in violation of the Sherman Act and for the purpose of creating a monopoly of the trade in bananas between Costa Rica and the United States, had procured the Republic of Costa Rica to seize the plaintiff's plantation, to drive away the plaintiff's workmen, and to destroy the plantation itself. The Supreme Court of the United States held distinctly that this was not a justiciable controversy; that inasmuch as it was alleged that the defendant had obtained the aid of a sovereign state to commit the alleged torts, and they had in fact been committed by officials of that sovereign state, no court had the right to award damages for the injury that the plaintiff had sustained, and that its only redress was through diplomatic channels.

The British courts before this time had held that the validity of an act of state, as it was called, of a foreign government, could not be inquired into by a court of justice. To use the language of Lord Campbell in the *Duke of Brunswick's Case*, 2 House of Lords, 1, 27:

The Lord Chancellor, I presume, would not grant an injunction against the French Republic marching an army across the Rhine or the Alps.

But no English decision, in my judgment, had gone quite so far as this American decision. Nevertheless, the last word from the Su-

preme Court certainly declares the law of the United States, and justly receives great consideration from the highest courts of other nations. We may therefore consider that for the future, unless legislation should provide a new remedy, controversies such as that which form the basis of this particular litigation will be presented through diplomatic channels.

It is, however, obvious that such controversies are, in their own nature, the subject of decision by an international tribunal. Whether the act of a sovereign state in evicting citizens of another state from property of which they were in the peaceable possession, and in destroying this property, is or is not lawful, is in its nature capable of decision by an impartial tribunal. Yet it is precisely such controversies that have frequently been made the occasion or pretext for war. The war now pending between Italy and Turkey was declared for the avowed purpose of redressing injuries of this character, which had been inflicted by the Turkish Government or its citizens upon Italian citizens who were lawfully in that part of the Turkish Empire known as Tripoli.

Inasmuch as the whole object of the movement for international arbitration is to prevent war, and since wars have been frequently occasioned by controversies of this sort, it would seem obvious that we should at least attempt to facilitate the adjudication of such controversies before the international tribunal at The Hague.

It is equally clear that the more we facilitate the reference of controversies to this tribunal, the more speedily shall we accomplish the object of a permanent court of international justice. The main reason—perhaps the only reason—for the character and composition of the present Hague tribunal is that very few controversies are referred to it; that a permanent court would not have business enough to occupy it, and that therefore it would be unwise to establish a permanent court.

And now leaving generalities, let us come down to particulars. The present method by which claims of the character mentioned are prosecuted is this: A petition is presented to the State Department, setting out the grievance alleged and asking the government to present the claim to some foreign Power. An appointment is made with the Secretary of State. Counsel for the claimant undertakes to present the claim. While he is in the midst of his statement, the telephone bell rings. It is perhaps the President who desires to confer with the Sec-

retary of State. Public business is, of course, more urgent than the private claim, and the counsel stops short in his argument and has it deferred to another day, while the Secretary attends to the more urgent business put before him by the Chief Executive. Or perhaps the Minister from Siam is announced. It would, of course, be highly discourteous for the Secretary of State to refuse to receive the minister of a foreign state. The hearing then is by this interrupted, and the counsel for the claimant is remitted to some other day. This day may well be remote. The Secretary of State of the United States is a very busy person, who has before him a thousand matters of great importance to the public welfare, and it is not possible that the representative of a private claimant should see him whenever, in the interest of his client, he might desire to be heard.

But let us suppose that the counsel has been heard by the Secretary. The next step in the proceeding is to refer the matter to the Solicitor for the State Department. The Secretary of State naturally desires a report from him. Accordingly the counsel attends before the Solicitor. It is true that in this counsel is not interrupted by a visit from any minister or ambassador, but the telephone bell is just as cogent and efficacious an interrupter as a visit from an ambassador. There are, of course, many matters of great importance concerning which the Secretary requires to confer with the Solicitor, and it is needless to say that the argument of counsel loses very much of its force in consequence. But let us suppose that the counsel has been heard before the Solicitor.

It may easily happen that the very next day some public exigency may arise which may require the Solicitor to defer the consideration of the plea to a more convenient season. It may be important that the Solicitor should attend at some diplomatic conference in Europe. He may be called upon to take part in presenting a case on behalf of the United States before this very Hague tribunal. So it may very well happen that the exigencies of public business prevent the Solicitor from passing upon the claim. He may be transferred to another post of duty, and the matter may thus have to be presented to a second—sometimes to a third—Solicitor. It is, alas, the fact that the salary of Solicitors of the State Department is not what it ought to be. It has frequently happened that a lawyer, most eminently qualified for that office, has been called away from it to some other more lucrative position, and there must be a successor who will take up the business of the Department *de novo*.

Again, let us assume that these various obstacles have been surmounted; that the second or the third Secretary of State to whom the matter has been presented, or the second or third Solicitor before whom argument has been had, is favorably inclined to the claim. It will naturally occur to you that he may feel that there are other parties in interest who should be heard before the claim is actually pressed by the Department. It may very well be that notice should be given to the adverse parties, and that they may have briefs to present and arguments to offer. Now, it is not the usage of diplomacy that in such case the counsel for the claimant should meet the counsel for the adverse party face to face. Each presents his own case the best he can, with very little or no information as to what has been said on the other side. No doubt the claimant's petition is on file. It may be a brief is also on file. But the opportunity which all lawyers consider so important in judicial proceedings, of meeting your adversary face to face and discussing the subject orally in the presence of the tribunal that is to pass upon it, is entirely denied. And thus it often happens that claims which are meritorious, and claims which are even finally allowed, descend from generation to generation. The case of the *Brig Armstrong* is, perhaps, the most notable, but there are many more. The counsel who has to present a claim before the State Department (and I do not say the difficulties there are more serious than they are in other Departments), is frequently reminded of the famous lines of Spenser:

Full little knowest thou who hast not tried,
 What hell it is in suing long to bide;
 To lose good days that might be better spent,
 To pass long nights in pensive discontent,
 To speed today—to be put back tomorrow.

This description of the claimant in the court of Queen Elizabeth is a picture of what has occurred many times since in the chancellery of every government in the world. It perhaps was inevitable in the days when there was no international tribunal; when often armed intervention was asked in order to enforce a claim; and when the propriety of such intervention might well be disputed on grounds quite independent of the merits of the claim. In short, under the old system, expediency was inevitably the ground of decision, and not justice.

But now we have a court of justice. It ought not then to be very difficult to provide for the submission to that court of claims against one sovereign state made by the citizen of another. The means thereto which I would suggest are these: Let there be a Solicitor in the State Department whose exclusive business it shall be to deal with all claims presented to that Department by citizens of the United States against any foreign government. He should have an adequate salary. His duty should be to examine into these claims, not for the purpose of passing finally upon them, but sufficiently to determine whether they are presented in good faith; and whether they have any *prima facie* basis which would warrant their presentation to an international tribunal.

If they have, it should be his duty to communicate with the proper officer of the foreign state against whom the claim is made, and inform him of the claim and inquire whether or not the foreign government in question is disposed to make any offer in settlement of the claim, or whether it insists upon the claim being presented to the international court of arbitral justice. If a compromise should be proposed, it would be the duty of the Solicitor to submit this to the counsel for the claimant. If the Solicitor were clearly of the opinion that the offer should be accepted, it would be his duty to say so; otherwise the decision would rest with the claimant. If the claimant should refuse the proposed compromise, the next step would be the making up of a case and the presentation of it to the Hague tribunal in the manner pointed out by the Hague convention. Evidence would then be taken; that court would render its decision; and this decision would undoubtedly be respected and obeyed by all parties concerned. Here then, instead of delay, you have promptness; instead of confusion, you have order; instead of expediency, you have justice.

May we not hope that the present Administration, which has done so much to promote the cause of international peace, may at least recommend this proposed change of method and do what it can to secure for claimants an orderly and judicial determination upon the merits of their claims?

The CHAIRMAN. The paper is open to discussion.

Mr. LANGE. Mr. President, it may perhaps be considered a thankless, and, to a certain extent, a disgraceful act on my part to intro-

duce a jarring note, after the very remarkable paper which we have just heard from Mr. Tryon, which was born of such a noble enthusiasm.

However, I feel it my duty to put in a little word of excuse and defense on the part of those European states which dissented from the American proposal at the Second Hague Conference, of establishing a Court of Arbitral Justice. I shall be very brief and only say that it must not be taken as a sort of conservative spirit of skepticism in international matters that this dissension manifested itself. This opposition was born of very strong conviction. One of the most distinguished members of The Hague Conference, who was a member also of the first one, said, about the proposal of an international court of justice, "Well, that will be a fine kitchen in which to cook small steaks."

You have, at any rate, to reckon with that skepticism, and I confess myself, though being an enthusiastic internationalist and having no doubt as to the establishment in the ripening of time of an international court, that when I heard the proposal at the Second Hague Conference of a real permanent court, I thought the time was not ripe by far. I should like to suggest that the right procedure in this matter would not be to endeavor to create the necessity, but that the proper procedure would be to take tentative and slow steps. Mr. Tryon suggested and Dr. Trueblood followed him in saying that this court might serve for different purposes. Well, would it not be a much better thing to take a definite purpose and try to create for this definite purpose a regular permanent court, even if that court was not a universal court, and particularly not an obligatory court, which would be an impossibility, I think, to a great many states. Mr. Wheeler a moment ago spoke about the very frequent claims of private citizens against foreign states. I think it would be a most useful thing for international lawyers to try to create a special court for those claims, just as a special court has been created for prize cases. It has also been suggested that a court might be created for cases relating to the conflict of laws, and I think if the states which are opposed to the Hague convention on private international law could see their way to create a court for these cases, a most useful step would have been taken. I think it is to be considered as impracticable and as unwise to press for consideration by the Third Hague Conference the plan of a general court for all cases—a really universal court. I should

add that Dr. Trueblood was mistaken when he thought there was no dissent as to the adoption of this court. Not only did several states abstain from voting, but one state, Switzerland, took the very strong method of writing down its reserve, which is a very unusual procedure. You may say that at The Hague they adopted the International Prize Court; but you must remember as to that, that even if the International Prize Court might be considered from the standpoint of some states as not very satisfactory, it is much more satisfactory than the present state of affairs, when crises are submitted only to international prize courts. The universal court of justice did not represent much progress, from the standpoint of the smaller states, and it was feared that it might be a danger to their existence. I do not share that feeling, but I think it is due to the members of the Society to present this view, because it will be necessary for you to contend with practical conditions, and it will be necessary to reckon with the feelings of those with whom you have to work.

The CHAIRMAN. A paper will now be read by Mr. Henry White, formerly American Ambassador to France, on "The Organization and Procedure of the Third Hague Conference."

ADDRESS OF HONORABLE HENRY WHITE, FORMERLY AMERICAN
AMBASSADOR TO FRANCE,

on

THE ORGANIZATION AND PROCEDURE OF THE THIRD HAGUE
CONFERENCE.

I am afraid that the subject of this paper is not quite accurately described in the program. I was asked to give the American Society of International Law my "experience and views concerning the organization and procedure of conferences in general," whereas the program would imply the expression of an opinion as to the organization and procedure of the next peace conference at The Hague.

I feel that it would be rather presumptuous on the part of one who has not been a delegate at either of the two International Peace Conferences which have already taken place, to give advice as to the manner in which the third should be organized. If, however, a brief account of the methods adopted for the organization of those con-